

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

United States of America,

Case No.: 2:11-cr-0414-APG-CWH

Plaintiff,

**ORDER DENYING EMERGENCY  
MOTION TO REDUCE OR MODIFY  
SENTENCE**

Jose Cardenas,

[ECF No. 133]

**Defendant.**

8 Defendant Jose Cardenas pleaded guilty to Conspiracy to Possess a Controlled Substance  
9 (methamphetamine) with Intent to Deliver. On November 17, 2012, he was sentenced to 120  
10 months in custody. He has served approximately 8.5 years of that sentence and has  
11 approximately 65 days remaining. He now moves for compassionate release under 18 U.S.C.  
12 § 3582(c)(1)(A) because he suffers from asthma and could be especially harmed by the Covid-19  
13 virus that apparently has infected some of the inmates at the federal facility where he is housed.  
14 The United States opposes the request.

15 The compassionate release statute authorizes courts to reduce a defendant's term of  
16 imprisonment, but only "after the defendant has fully exhausted all administrative rights to  
17 appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse  
18 of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever  
19 is earlier . . ." 18 U.S.C. § 3582(c)(1)(A). Cardenas applied for compassionate release with the  
20 warden of FCI Yazoo City Low on April 16, 2020. ECF No. 133 at 6. He filed his motion with  
21 this court six days later, on April 22, 2020. Thus, he has not exhausted his administrative  
22 remedies as required by the statute. Cardenas contends that I can and should waive his failure to  
23 exhaust and grant his motion on the merits.

1       “Of ‘paramount importance’ to any exhaustion inquiry is congressional intent. . . . Where  
 2 Congress specifically mandates, exhaustion is required.” *McCarthy v. Madigan*, 503 U.S. 140,  
 3 144 (1992) (citations omitted). The Supreme Court of the United States has emphasized the  
 4 difference between “judge-made exhaustion doctrines, [which] remain amendable to judge-made  
 5 exceptions,” and Congressionally mandated exhaustion requirements, which are not. *Ross v.*  
 6 *Blake*, 136 S. Ct. 1850, 1857 (2016). “[A] statutory exhaustion provision stands on a different  
 7 footing. There, Congress sets the rules—and courts have a role in creating exceptions only if  
 8 Congress wants them to. For that reason, mandatory exhaustion statutes . . . establish mandatory  
 9 exhaustion regimes, foreclosing judicial discretion.” *Id.* (examining the language of the Prison  
 10 Litigation Reform Act).<sup>1</sup>

11       “Section 3582(c)(1)(A) imposes a statutory exhaustion requirement that must be strictly  
 12 enforced.” *United States v. Perez*, No. 17 CR. 513-3 (AT), 2020 WL 1546422, at \*2–3 (S.D.N.Y.  
 13 Apr. 1, 2020) (quotations and citations omitted).<sup>2</sup> While some courts have ignored the  
 14 distinction between judge-made exhaustion and Congress-made exhaustion, I cannot overlook  
 15 the explicit language of the compassionate release statute and the Supreme Court’s directive in  
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18<sup>1</sup> See also *Shaw v. Bank of Am. Corp.*, 946 F.3d 533, 541 (9th Cir. 2019) (“[I]f exhaustion ‘is a  
 19 statutorily specified prerequisite’—as opposed to a judicially created one—‘[t]he requirement is  
 20 . . . something more than simply a codification of the judicially developed doctrine of  
 21 exhaustion, and may not be dispensed with merely by a judicial conclusion of futility[.]’”  
 22 (quoting *Weinberger v. Salfi*, 422 U.S. 749, 766 (1975))); *Gallo Cattle Co. v. U.S. Dep’t of*  
*Agric.*, 159 F.3d 1194, 1197 (9th Cir. 1998) (“[W]hile judicially-created exhaustion requirements  
 23 may be waived by the courts for discretionary reasons, statutorily-provided exhaustion  
 requirements deprive the court of jurisdiction and, thus, preclude any exercise of discretion by  
 the court.”); *United States v. Meron*, No. 2:18-CR-0209-KJM, 2020 WL 1873900, at \*2 (E.D.  
 Cal. Apr. 15, 2020) (holding exhaustion under 18 U.S.C. § 3582(c) is not judicially waivable).

<sup>2</sup> After stating this principle, the judge in *Perez* nevertheless turned to judge-made exceptions to  
 exhaustion.

1 Ross.<sup>3</sup> While the exhaustion requirement may not be jurisdictional for compassionate release,  
2 and while some have called it simply a gate-keeping function for the Bureau of Prisons, there are  
3 good reasons to allow the warden 30 days to review an application. That remains true even in  
4 the rapidly-changing environment of this pandemic. The United States Attorney General has  
5 pressed the Bureau to use compassionate release and other tools to reduce the risk of infection.  
6 In this case, the warden is due the Congressionally mandated time to review Cardenas's  
7 application.

8 Because Cardenas has not exhausted his administrative remedy, I do not have authority to  
9 entertain his motion at this time. In his reply, Cardenas asks that if I require exhaustion, I should  
10 defer ruling on his motion until May 16, 2020 (30 days after he applied to his warden). I decline  
11 to do so. However, I am denying the motion without prejudice to his ability to refile it if he has  
12 not been approved for release by May 16, 2020. If he files a new motion, he may simply  
13 incorporate by reference all of his arguments from the present motion and reply, and supplement  
14 it with any new evidence or arguments.

15 I THEREFORE DENY Mr. Cardenas's motion (ECF No. 133) without prejudice. If he  
16 exhausts his administrative remedies and has not received the relief he requests, he may file a  
17 new motion.

18 Dated: April 29, 2020.

19   
20 ANDREW P. GORDON  
21 UNITED STATES DISTRICT JUDGE

22 <sup>3</sup> District Judge Bryant in the District of Connecticut aptly summarized the dilemma for those  
23 seeking consistency: "The Second Circuit has not directly addressed the question, and district  
courts in the Second Circuit have come, by a multiplicity of methods, to both conclusions."  
*United States v. Sanchez*, No. 18-CR-00140-VLB-11, 2020 WL 1933815, at \*3 (D. Conn. Apr.  
22, 2020).